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CENTRAL INTELLIGENCE AGENCY

WASHINGTON, D.C. 20505

OLC 75-1678

18 JUL 1975

Mr. James M. Frey
Assistant Director for Legislative Reference
Office of Management and Budget
Washington, D. C. 20503

Dear Mr. Frey:

Enclosed are proposed reports to Chairman Rodino, House Judiciary Committee, and Chairman Eastland, Senate Judiciary Committee, offering comments respectively on H. R. 61 and S. 1428, bills concerning the dissemination and use of criminal justice information.

H. R. 61 and S. 1428 are identical to the Department of Justice draft bill on criminal justice information, and the enclosed reports are identical to the report we made to the Office of Management and Budget on 27 June 1975 concerning that draft bill.

Both the House and Senate have recently held hearings in this area, and it is expected that legislation will be reported out in the near future. We request that the enclosed reports be cleared as expeditiously as possible.

Sincerely,

George L. Cary
Legislative Counsel

Enclosure

Distribution:

- Orig. - Addressee, w/encl
1 - H.R. 61 file, w/encl
1 - S. 1428 file, w/encl
1 - OMB Liaison file, w/encl
1 - OLC/Chrono

OLC:WPB:dw (18 July 1975)

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CENTRAL INTELLIGENCE AGENCY

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Honorable Peter W. Rodino, Jr., Chairman
Committee on the Judiciary
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

I am offering for your consideration our comments on H. R. 61, a bill concerning the dissemination and use of criminal justice information. The Central Intelligence Agency is strongly committed to the underlying objective of the proposed legislation which is to protect the right of privacy of citizens of the United States.

It is the position of this Agency that the Central Intelligence Agency is not a "criminal justice agency." However, we believe that the definition of "criminal justice agency" in H. R. 61 should be clarified to avoid any question of this fact in that legislation. If the Central Intelligence Agency were considered to be within that definition, it would be subject to requirements in conflict with its statutory charter. As a non-criminal justice agency, however, the Agency's access to important foreign intelligence information would be seriously impaired by H. R. 61.

The language of H. R. 61 was originally drafted in the Department of Justice. It has been ascertained in discussions with that Department that it was not intended to characterize the Central Intelligence Agency as a "criminal justice agency." This intent is consistent with and indeed mandated by the proscription of section 102(d)(3) of the National Security Act of 1947:

... That the Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions ...

The Central Intelligence Agency's scope of authority is limited to foreign intelligence matters; it is definitely not a criminal justice agency.

There is, however, considerable ambiguity in the definition of "criminal justice agency" in section 102(6) of the bill. For instance, while the Agency's mission is not the detection of criminal offenses as such, foreign intelligence information sometimes has a bearing on criminal conduct, e.g., international narcotics trafficking or foreign terrorist activities. Thus, the language of



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sections 102(5) and 102(6) could give rise to the argument that this Agency is a "criminal justice agency" to the extent that it obtains information relating to the "detection of ... criminal offenses." I strongly recommend that H. R. 61 be amended to make clear that the Central Intelligence Agency is not a "criminal justice agency." (Section I of the attached memorandum discusses the necessity for this clarification in more detail.)

While the Central Intelligence Agency is not to be considered a criminal justice agency, as a non-criminal justice agency under H. R. 61 it would be confronted with requirements which could impinge upon its essential responsibilities by barring Agency access to important foreign intelligence information.

The dissemination of foreign intelligence is a principal statutory function of the Central Intelligence Agency. Section 102(d)(3) of the National Security Act of 1947 imposes on the Agency a duty

... to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities ...

Moreover, section 102(e) of the National Security Act of 1947 provides:

... To the extent recommended by the National Security Council and approved by the President, such intelligence of the departments and agencies of the Government ... relating to the national security shall be open to the inspection of the Director of Central Intelligence, and such intelligence as relates to the national security and is possessed by such departments and other agencies of the Government ... shall be made available to the Director of Central Intelligence for correlation, evaluation, and dissemination ...

Certain provisions of H. R. 61 would impinge on this responsibility by preventing the Agency from obtaining foreign intelligence information in cases where such information includes items defined in section 102 as "criminal justice information." For example, the limitations in sections 204, 206(a), and 201(d) would preclude Agency receipt of information held by foreign and domestic criminal justice agencies concerning the criminal activities of a foreign terrorist. I recommend that H. R. 61 be appropriately modified to take into account the occasional necessity of disseminating to foreign intelligence agencies material which section 102 defines as "criminal justice information" and the need to protect such information in their possession. (Section II of the attached memorandum discusses in greater detail the problems that the Agency would be confronted with under H. R. 61 as a non-criminal justice agency.)

I would like to propose for your consideration the amendments to H. R. 61 set forth in section III of the attached memorandum. I believe they would satisfy the above-mentioned considerations while preserving the intent and objectives of the legislation.

The Office of Management and Budget has advised there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

W. E. Colby
Director

MEMORANDUM

SUBJECT: H. R. 61, Criminal Justice Information

Section I

1. The regulatory provisions proposed in H. R. 61 would apply to certain kinds of information collected or compiled by "criminal justice agencies." These provisions would apparently extend to information from foreign sources, concerning foreign citizens and relating to conduct made criminal under foreign laws. The term "criminal justice agency" is defined in section 102(6), inter alia, as an agency which performs "criminal justice activities." The term "criminal justice" is defined in section 102(5) as referring "to the activities of a criminal justice agency relating to protection against, detection of, or investigation of criminal offenses" (emphasis added).

2. The foreign intelligence mission of the Central Intelligence Agency is not directed at the detection of criminal offenses as such; yet in its pursuit, information is sometimes obtained which has a bearing on criminal conduct, such as international narcotics trafficking or foreign terrorist activities. The definitions of "criminal justice" and "criminal justice agency" in sections 102(5) and 102(6) respectively are ambiguous and could give rise to an argument that the Central Intelligence Agency is a criminal justice agency to the extent that it gathers information relating to the "detection of ... criminal offenses" in connection with such matters.

3. The Central Intelligence Agency is not a criminal justice agency. It was established by the National Security Act of 1947 to provide the President and his policy advisers with foreign intelligence information. In addition, that Act provides:

... That the Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions ... (50 U.S.C. 403).

4. There are at least three reasons why the Central Intelligence Agency is not a "criminal justice agency."

(a) The designation of the Central Intelligence Agency as a "criminal justice agency" would be contrary to existing law and efforts within Congress and the Executive branch to insure that all legislation clearly states that this Agency has no law-enforcement or criminal justice purpose.

(b) As a "criminal justice agency," the Central Intelligence Agency would be subject to the regulatory provisions of Title 2 of H. R. 61 concerning the collection, dissemination, and use of criminal justice information by criminal justice agencies and the provisions for the administration and enforcement of these provisions by the Commission created in Title 3. Some of these provisions would conflict with the Director's statutory obligation to protect Intelligence Sources and Methods (50 U.S.C. 403); with the Agency's principal statutory duty to correlate and evaluate foreign intelligence and to provide for its appropriate dissemination within the Government using where appropriate existing agencies and facilities (50 U.S.C. 403); and with the Agency's general exemption from provisions of any other law which would require the publication or disclosure of Agency organization, functions, or personnel (50 U.S.C. 403). Among the provisions which raise potential conflicts are the following:

--Sections 204 and 206(a), which provide for the exchange, dissemination and use of criminal justice information for non-criminal justice purposes, would preclude the dissemination of foreign intelligence information to appropriate domestic and foreign consumers where such intelligence contained "criminal justice information."

--Section 204(c), which requires non-criminal justice recipients of arrest record or criminal record information to notify the subject individual, could result in alerting foreign intelligence subjects of the Agency's interest in their activities.

--Section 208, which grants the subject individual (presumably including foreign citizens) access to arrest and criminal record information for personal inspection, could under given circumstances result in betraying this Agency's interest in a foreign intelligence subject or in compromising a sensitive liaison relationship with a foreign service.

--Section 209(b)(2), which would require the identifying and recording of the personnel with access to criminal justice intelligence information within an agency to which such information has been disseminated, could result in disclosing the identities of covert Agency officers.

--Section 302(a)(3), which empowers the "Commission on Criminal Justice Information" to investigate allegations of non-compliance with the Act, could result in Commission access to the most sensitive Intelligence Sources and Methods at the prompting of each allegation of non-compliance.

--Section 302(a)(4) would require the Agency to provide the Commission all information necessary to compile a public directory of "criminal justice information systems" identifying their nature, purpose, and scope. This section could result in the compromise of Intelligence Sources and Methods to the extent that it requires disclosure of Agency holdings on, or interest in, a foreign intelligence subject.

(c) Application to the Central Intelligence Agency of the requirements of Title 2 whenever foreign intelligence information pertains to criminal conduct would undermine the Agency's essential function of gathering, evaluating, correlating, and disseminating foreign positive intelligence in support of the foreign policy-making process. In order to comply with the Act, the Agency would be required to analyze foreign intelligence information against criminal law standards and arrange its information systems and the pattern of intra-Agency intelligence dissemination according to criminal justice values which may be irrelevant to and indeed impede the foreign intelligence process.

5. It is strongly recommended that section 102(5) of H. R. 61 be amended to make clear that foreign intelligence collection is not a criminal justice activity.

Section II

1. The Central Intelligence Agency is not a criminal justice agency. As a non-criminal justice agency, however, the Agency's access to important foreign intelligence information would be seriously impaired by H. R. 61.

2. The Central Intelligence Agency has no general interest in obtaining criminal justice information *per se*. In support of the Director's position as the President's principal foreign intelligence advisor, this Agency must have access to information characterized in H. R. 61 as "criminal justice information" where it pertains to a foreign intelligence subject. Indeed, section 102(e) of the National Security Act of 1947 provides:

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... To the extent recommended by the National Security Council and approved by the President, such intelligence of the departments and agencies of the Government ... relating to the national security shall be open to the inspection of the Director of Central Intelligence, and such intelligence as relates to the national security and is possessed by such departments and other agencies of the Government ... shall be made available to the Director of Central Intelligence for correlation, evaluation, and dissemination ...

Moreover, section 102(d)(3) of the National Security Act of 1947 imposes on the Agency the duty

... to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities

It is conceivable under given circumstances that the Agency would require access to any one of the five classes of information characterized as "criminal justice information" in H. R. 61. This is especially true because each class could include information from foreign sources, concerning foreign citizens and relating to conduct made criminal under foreign laws. The limitations in sections 204 and 206(a) on the collection, dissemination, and use of criminal justice information for non-criminal justice purposes would preclude Agency receipt of foreign intelligence information held by domestic agencies and, by implication of section 201(d), held by foreign governments where such information falls within the definition of "criminal justice information" in H. R. 61. Such restrictions would impinge upon the Agency's statutory responsibilities referred to above.

3. It is noted that section 205(b) would permit non-criminal justice agencies to use criminal justice information in screening applicants or for approving or reviewing security clearances. The Central Intelligence Agency may also wish to obtain criminal justice information on individuals who are being considered as possible intelligence sources or for operational purposes without initially notifying the individuals under consideration.

4. In those cases where the Agency would be able to obtain criminal justice information under sections 204(a) or (b), it would be required to notify the subject of such records under section 204(c). This notification could result in betrayal of Agency interest in a foreign intelligence subject.

5. It is strongly recommended that H. R. 61 be appropriately modified to take into account not only the need for material defined in the bill as "criminal

justice information" by foreign intelligence agencies, but also the need to protect such information in their possession and in some cases protect the fact that they have sought it or have it.

Section III

1. It is believed that the suggested amendments below would satisfy the considerations and statutory conflicts referred to in sections I and II of this memorandum, while preserving the intent and objectives of the legislation.

2. Proposed Amendment to H. R. 61:

(a) Strike section 102(5) and insert in lieu thereof the following:

--Section 102(5) "Criminal justice" refers to the activities of a criminal justice agency relating to protection against, detection of, or investigations of criminal offenses as such, or to the apprehension, detention, pretrial release, posttrial release, prosecution, defense, correctional supervision or rehabilitation of accused persons or criminal offenders, adjudication of a charge, or processing requests for executive clemency, but shall not refer to foreign intelligence collection activities where undertaken by an agency of the United States authorized to conduct such activities.

(b) Insert after section 204(i) the following new section:

(j) In the interests of promoting all-sources intelligence production, and in order further to implement sections 102(d)(3) and 102(e) of the National Security Act, as amended, information defined in section 102 of this Act as "criminal justice information" may be made available to the Director of Central Intelligence as directed by the National Security Council, where necessary for foreign intelligence purposes.

(c) Insert after section 103(b)(8) the following new section:

(9) information relating to foreign intelligence sources and methods designated for protection from unauthorized disclosure pursuant to 50 U.S.C. 403.

Honorable James O. Eastland, Chairman
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

I am offering for your consideration our comments on S. 1428, a bill concerning the dissemination and use of criminal justice information. The Central Intelligence Agency is strongly committed to the underlying objective of the proposed legislation which is to protect the right of privacy of citizens of the United States.

It is the position of this Agency that the Central Intelligence Agency is not a "criminal justice agency." However, we believe that the definition of "criminal justice agency" in S. 1428 should be clarified to avoid any question of this fact in that legislation. If the Central Intelligence Agency were considered to be within that definition, it would be subject to requirements in conflict with its statutory charter. As a non-criminal justice agency, however, the Agency's access to important foreign intelligence information would be seriously impaired by S. 1428.

The language of S. 1428 was originally drafted in the Department of Justice. It has been ascertained in discussions with that Department that it was not intended to characterize the Central Intelligence Agency as a "criminal justice agency." This intent is consistent with and indeed mandated by the proscription of section 102(d)(3) of the National Security Act of 1947:

... That the Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions ...

The Central Intelligence Agency's scope of authority is limited to foreign intelligence matters; it is definitely not a criminal justice agency.

There is, however, considerable ambiguity in the definition of "criminal justice agency" in section 102(6) of the bill. For instance, while the Agency's mission is not the detection of criminal offenses as such, foreign intelligence information sometimes has a bearing on criminal conduct, e.g., international narcotics trafficking or foreign terrorist activities. Thus, the language of



sections 102(5) and 102(6) could give rise to the argument that this Agency is a "criminal justice agency" to the extent that it obtains information relating to the "detection of ... criminal offenses." I strongly recommend that S. 1428 be amended to make clear that the Central Intelligence Agency is not a "criminal justice agency." (Section I of the attached memorandum discusses the necessity for this clarification in more detail.)

While the Central Intelligence Agency is not to be considered a criminal justice agency, as a non-criminal justice agency under S. 1428 it would be confronted with requirements which could impinge upon its essential responsibilities by barring Agency access to important foreign intelligence information.

The dissemination of foreign intelligence is a principal statutory function of the Central Intelligence Agency. Section 102(d)(3) of the National Security Act of 1947 imposes on the Agency a duty

... to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities ...

Moreover, section 102(e) of the National Security Act of 1947 provides:

... To the extent recommended by the National Security Council and approved by the President, such intelligence of the departments and agencies of the Government ... relating to the national security shall be open to the inspection of the Director of Central Intelligence, and such intelligence as relates to the national security and is possessed by such departments and other agencies of the Government ... shall be made available to the Director of Central Intelligence for correlation, evaluation, and dissemination ...

Certain provisions of S. 1428 would impinge on this responsibility by preventing the Agency from obtaining foreign intelligence information in cases where such information includes items defined in section 102 as "criminal justice information." For example, the limitations in sections 204, 206(a), and 201(d) would preclude Agency receipt of information held by foreign and domestic criminal justice agencies concerning the criminal activities of a foreign terrorist. I recommend that S. 1428 be appropriately modified to take into account the occasional necessity of disseminating to foreign intelligence agencies material which section 102 defines as "criminal justice information" and the need to protect such information in their possession. (Section II of the attached memorandum discusses in greater detail the problems that the Agency would be confronted with under S. 1428 as a non-criminal justice agency.)

I would like to propose for your consideration the amendments to S. 1428 set forth in section III of the attached memorandum. I believe they would satisfy the above-mentioned considerations while preserving the intent and objectives of the legislation.

The Office of Management and Budget has advised there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

W. E. Colby
Director

MEMORANDUM

SUBJECT: S. 1428, Criminal Justice Information

Section I

1. The regulatory provisions proposed in S. 1428 would apply to certain kinds of information collected or compiled by "criminal justice agencies." These provisions would apparently extend to information from foreign sources, concerning foreign citizens and relating to conduct made criminal under foreign laws. The term "criminal justice agency" is defined in section 102(6), *inter alia*, as an agency which performs "criminal justice activities." The term "criminal justice" is defined in section 102(5) as referring "to the activities of a criminal justice agency relating to protection against, detection of, or investigation of criminal offenses" (emphasis added).

2. The foreign intelligence mission of the Central Intelligence Agency is not directed at the detection of criminal offenses as such; yet in its pursuit, information is sometimes obtained which has a bearing on criminal conduct, such as international narcotics trafficking or foreign terrorist activities. The definitions of "criminal justice" and "criminal justice agency" in sections 102(5) and 102(6) respectively are ambiguous and could give rise to an argument that the Central Intelligence Agency is a criminal justice agency to the extent that it gathers information relating to the "detection of ... criminal offenses" in connection with such matters.

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(b) As a "criminal justice agency," the Central Intelligence Agency would be subject to the regulatory provisions of Title 2 of S. 1428 concerning the collection, dissemination, and use of criminal justice information by criminal justice agencies and the provisions for the administration and enforcement of these provisions by the Commission created in Title 3. Some of these provisions would conflict with the Director's statutory obligation to protect Intelligence Sources and Methods (50 U.S.C. 403); with the Agency's principal statutory duty to correlate and evaluate foreign intelligence and to provide for its appropriate dissemination within the Government using where appropriate existing agencies and facilities (50 U.S.C. 403); and with the Agency's general exemption from provisions of any other law which would require the publication or disclosure of Agency organization, functions, or personnel (50 U.S.C. 403). Among the provisions which raise potential conflicts are the following:

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5. It is strongly recommended that section 102(5) of S. 1428 be amended to make clear that foreign intelligence collection is not a criminal justice activity.

Section II

1. The Central Intelligence Agency is not a criminal justice agency. As a non-criminal justice agency, however, the Agency's access to important foreign intelligence information would be seriously impaired by S. 1428.

2. The Central Intelligence Agency has no general interest in obtaining criminal justice information per se. In support of the Director's position as the President's principal foreign intelligence advisor, this Agency must have access to information characterized in S. 1428 as "criminal justice information" where it pertains to a foreign intelligence subject. Indeed, section 102(e) of the National Security Act of 1947 provides:

... To the extent recommended by the National Security Council and approved by the President, such intelligence of the departments and agencies of the Government ... relating to the national security shall be open to the inspection of the Director of Central Intelligence, and such intelligence as relates to the national security and is possessed by such departments and other agencies of the Government ... shall be made available to the Director of Central Intelligence for correlation, evaluation, and dissemination ...

Moreover, section 102(d)(3) of the National Security Act of 1947 imposes on the Agency the duty

... to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities

It is conceivable under given circumstances that the Agency would require access to any one of the five classes of information characterized as "criminal justice information" in S. 1428. This is especially true because each class could include information from foreign sources, concerning foreign citizens and relating to conduct made criminal under foreign laws. The limitations in sections 204 and 206(a) on the collection, dissemination, and use of criminal justice information for non-criminal justice purposes would preclude Agency receipt of foreign intelligence information held by domestic agencies and, by implication of section 201(d), held by foreign governments where such information falls within the definition of "criminal justice information" in S. 1428. Such restrictions would impinge upon the Agency's statutory responsibilities referred to above.

3. It is noted that section 205(b) would permit non-criminal justice agencies to use criminal justice information in screening applicants or for approving or reviewing security clearances. The Central Intelligence Agency may also wish to obtain criminal justice information on individuals who are being considered as possible intelligence sources or for operational purposes without initially notifying the individuals under consideration.

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5. It is strongly recommended that S. 1428 be appropriately modified to take into account not only the need for material defined in the bill as "criminal

justice information" by foreign intelligence agencies, but also the need to protect such information in their possession and in some cases protect the fact that they have sought it or have it.

Section III

1. It is believed that the suggested amendments below would satisfy the considerations and statutory conflicts referred to in sections I and II of this memorandum, while preserving the intent and objectives of the legislation.

2. Proposed Amendment to S. 1428:

(a) Strike section 102(5) and insert in lieu thereof the following:

--Section 102(5) "Criminal justice" refers to the activities of a criminal justice agency relating to protection against, detection of, or investigations of criminal offenses as such, or to the apprehension, detention, pretrial release, posttrial release, prosecution, defense, correctional supervision or rehabilitation of accused persons or criminal offenders, adjudication of a charge, or processing requests for executive clemency, but shall not refer to foreign intelligence collection activities where undertaken by an agency of the United States authorized to conduct such activities.

(b) Insert after section 204(i) the following new section:

(j) In the interests of promoting all-sources intelligence production, and in order further to implement sections 102(d)(3) and 102(e) of the National Security Act, as amended, information defined in section 102 of this Act as "criminal justice information" may be made available to the Director of Central Intelligence as directed by the National Security Council, where necessary for foreign intelligence purposes.

(c) Insert after section 103(b)(8) the following new section:

(9) information relating to foreign intelligence sources and methods designated for protection from unauthorized disclosure pursuant to 50 U.S.C. 403.